UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

CS CONSTRUCTION, INC.

Employer

and Case 28-RC-080331

OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, LOCAL 394

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered determinative challenges in an election held June 13, 2012, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 3 for and 0 against the Petitioner, with 4 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations only to the extent consistent with this decision, and finds that a certification of representative should be issued.

As the hearing officer correctly found, when resolving determinative challenged ballots in cases involving stipulated bargaining units, the Board's function is to ascertain the parties' intent and then to determine whether such intent is inconsistent with any statutory provision or established Board policy. In doing so, the Board applies the three-prong test adopted in *Caesar's Tahoe*, 337 NLRB 1096 (2002). Under the first prong of that test, the Board must determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear

and unambiguous terms in the stipulation, the Board simply enforces the agreement. Id. at 1097. Where the stipulation is ambiguous, extrinsic evidence may be considered to determine the parties' intent. If, after considering the extrinsic evidence, the parties' intent remains ambiguous, under the third prong of *Caesar's Tahoe*, the Board will apply community-of-interest principles to determine whether the disputed employees belong in the unit. Id.

Although we agree with the hearing officer's recommendation to sustain the challenges to the ballots of Jeremy Hill, Carlos Moreno, Carl Perkins, and Craig Potts, we do so under the first prong of *Caesar's Tahoe*, finding that the terms of the Stipulated Election Agreement unambiguously reflect the parties' intent to exclude these employees from the unit. Specifically, we find that the stipulation's reference to "full-time and regular part-time cement masons and finishers" clearly refers to the cement masons in the Employer's Concrete Structures division, and not to the four employees whose ballots were challenged, who work in the Employer's Traffic Signal and Lighting division. Notably, the bargaining unit is defined in terms of job classification, rather than by reference to duties performed. Further, it is evident that the designated classification refers to individuals who have the specialized training required to work in the Employer's Concrete Structures division, the employees the Union previously represented in its 8(f) agreement with the Employer. Therefore, as the stipulation includes "cement masons and finishers" and excludes "[a]ll other employees," it is clear that the parties intended to exclude the four employees who work in the Traffic Signal and Lighting division.

The hearing officer found that the terms of the stipulation were ambiguous but that, under the second prong of *Caesar's Tahoe*, the extrinsic evidence revealed the parties' intent to exclude Hill, Moreno, Perkins, and Potts from the unit. As there are no exceptions to the hearing

officer's finding concerning the extrinsic evidence, the challenges to the four ballots are sustained on this basis as well.¹

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Operative Plasterers' and Cement Masons' International Association, Local 394 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All full-time and regular part-time cement masons and finishers employed by the Employer in the State of Arizona.

EXCLUDED: All other employees, clerical employees, maintenance employees, foremen, general foremen, superintendents, managerial employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., January 23, 2013.

	Mark Gaston Pearce,	Chairman	
	Richard F. Griffin, Jr.,	Member	
	Sharon Block,	Member	
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¹ Because we find that the parties intended to exclude Hill, Moreno, Perkins, and Potts under the terms of the Stipulated Election Agreement, we find it unnecessary to reach the hearing officer's community-of-interest and dual-function findings.

Member Block concurs in the decision to affirm the hearing officer's recommendation to sustain the challenges to the ballots of employees Hill, Moreno, Perkins, and Potts. Because she would find that the parties' Stipulated Election Agreement is ambiguous, she would rely solely on the hearing officer's unexcepted-to finding that extrinsic evidence reveals the parties' intent to exclude these employees from the unit.